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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 67

THOMAS PAPER STOCK COMPANY, ET AL.,
Petitioners,

vs.

CHESTER BOWLES, PRICE ADMINISTRATOR,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 59-81) is reported in 148 F. (2d) 831.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered March 27, 1945 (R. 83). The petition for a writ of certiorari was filed April 26, 1945, and was granted June 4, 1945 (R. 85). Jurisdiction of this

Court is invoked under Section 204(d) of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, 50 U.S.C. App., Supp. III, Sec. 901, as amended by the Stabilization Extension Act of 1944, Public Law 383, 78th Cong., 2d Sess. (herein sometimes termed "the Act"), making applicable Section 240 of the Judicial Code, as amended (28 U.S.C. Sec. 347).

QUESTIONS PRESENTED

1. Whether a protest was not timely filed under Section 203(a) of the Emergency Price Control Act, in a case where no time limitation upon its filing was imposed by the language of the Act; where it attacked the validity of a price regulation retrospectively; and where, although the ground of invalidity had been removed by action of the Price Administrator prior to the filing of the protest, protestant was indicted *after* such administrative action for alleged violations occurring *prior* thereto and during the period of the Regulation's asserted invalidity.

2. Whether the construction of Section 203(a) of the Act by the Court below, as making such a protest untimely, and the construction of 204(a) of the Act, as not permitting judicial review of the Price Administrator's denial thereof, has deprived petitioners of due process of law.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, appear in Appendix I, *infra*, pp. 16-21. The maximum price regulation involved and pertinent amendment thereto appear in the Federal Register (7 F.R. 9732, 8 F.R. 12554).

STATEMENT

On November 21, 1942, the Price Administrator issued Maximum Price Regulation No. 30 establishing specific maximum prices for various grades of wastepaper. So far as here relevant, the Regulation provided that unsorted wastepaper might not be sold to consumers thereof at a price higher than the maximum price prescribed for No. 1 mixed paper.[1]

On July 16, 1943, the Emergency Price Control Act of 1942 was amended by the addition of Section 2(j), the so-called Taft Amendment. Section 2(j) provides that "Nothing in this Act shall be construed * * * (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to such commodity; * * *." For the purpose of this proceeding it is conceded by the Government that Maximum Price Regulation No. 30 "standardizes" unsorted waste paper and therefore falls within the purview of Section 2(j)(3) of the Act.

On September 11, 1943, the Administrator amended the preamble to Maximum Price Regulation No. 30 by adding the following sentence thereto:

> Insofar as this regulation uses specifications and standards which were not, prior to such use, in general use in the trade or industry affected, or insofar as their use was not lawfully required by another Government agency, the Administrator has determined, with respect to such standardization, that no practicable alternative exists for securing effective price control

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[1] On December 28, 1943, the section involved was amended by Amendment No. 6 (8 F.R. 17483). The amendment made no change relevant to the instant case.

with respect to the commodities subject to this regulation.

This amendment was made by Supplementary Order No. 64,[2] which was accompanied by a statement of the reasons involved in the issuance thereof (R. 31-37). At the same time the Administrator issued a supplementary statement of considerations involved in the issuance of Maximum Price Regulation No. 30 (R. 9-11).

On December 17, 1943, an indictment under Section 205(b) of the Act was returned in the United States District Court for the Northern District of Illinois, alleging that at specified times between July 16 and September 11, 1943, petitioners had made sales of unsorted waste paper at more than the maximum price prescribed by the Regulation. On June 29, 1944, a civil action under Section 205(a) and (e) of the Act was brought against petitioners by the Administrator in the same court, alleging similar violations (R. 52, 59).

On June 15, 1944, petitioners filed a protest against Section 1347.14(d) of the Regulation pursuant to Section 203(a) of the Emergency Price Control Act of 1942, as amended (R. 1-9). It was contended in the protest that Maximum Price Regulation No. 30 was currently invalid. Petitioners further specifically urged that Section 1347.14(d) of the Regulation be declared to have been invalid between July 16, 1943, and September 11, 1943.

On June 30, 1944, the Stabilization Extension Act of 1944 (Public Law 383, 78th Cong., 2d Sess.) became effective, amending the Emergency Price Control Act. This act added to Section 204 of the Emergency Price Control Act a new subsection (e), *infra*, pp. 19-21, which provides (1) for a limited right of defendants in Section 205 pro-

[2] 8 F.R. 12554.

ceedings to secure review of maximum price or rent regulations through a direct complaint to the Emergency Court of Appeals; and (2) for the stay or dismissal of, or vacation of judgment in, actions brought under Section 205 under certain circumstances.

On July 29, 1944, the Acting Administrator issued an order, accompanied by an opinion, denying petitioners' protest (R. 15-29). Thereupon, on August 26, 1944, petitioners filed a complaint with the Emergency Court of Appeals pursuant to Section 204(a) of the Emergency Price Control Act of 1942, as amended, seeking review of the denial of the protest (R. 45-49). The court dismissed the complaint, holding that the contested provision of Maximum Price Regulation No. 30 was currently valid and that the court had no jurisdiction under Section 204(a) of the Act to consider the objection that the provision was invalid during the period July 16 to September 11, 1943, on account of the Administrator's failure to determine during that period that there was no practicable alternative for securing effective price control (R. 59-81).

The judgment of the Emergency Court of Appeals was entered on March 27, 1945 (R. 83). Subsequently, certain proceedings were had in the District Court and in the Emergency Court of Appeals, which were brought to the attention of this Court by letters from the Solicitor General and counsel for petitioners. Since these matters are not a part of the record below, and therefore are not contained in the Transcript of Record, for convenient reference a statement of them is set forth in Appendix II, *infra*, pp. 22-27.

SPECIFICATION OF ERRORS TO BE URGED

The Emergency Court of Appeals erred in the following respects:

1. In refusing to consider whether, and in refusing to declare that, the Regulation protested was invalid during the period July 16 to September 11, 1943.

2. In holding that the Price Administrator was not required to determine whether the Regulation was invalid during the period July 16 to September 11, 1943.

3. In holding that the Emergency Price Control Act prohibits the filing of a protest against a regulation after the claimed ground of invalidity has been "corrected or cured".

4. In holding that the Emergency Court of Appeals is not required to review the denial of such a protest.

5. In holding that a protest filed under Section 203 of the Act, prior to the enactment of Section 204 (d)(1) is affected by the provisions of the latter subsection.

6. By holding that in the case at bar petitioners are afforded due process of law by the provisions of Section 204(e)(1) of the Act.

7. In construing the Act so as to leave it within the discretion of the District Court as to whether or not petitioners should be forced to trial under an *ex post facto* law.

SUMMARY OF ARGUMENT

I.

In a case where no time limitation upon the filing of a protest was imposed by the language of the Act, a protest attacking the validity of a price regulation retrospectively, filed under Section 203(a) of the Act prior to the incorporation of Section 204(e)(1) into the Act, was timely

filed even though the alleged ground of invalidity had been removed by action of the Price Administrator prior to the filing of the protest by a protestant who had been indicted *after* such administrative action for alleged violations occurring *prior* thereto and during the period of the Regulation's asserted invalidity.

II.

The construction of Section 203(a) of the Act by the Court below, as making such a protest untimely, and the construction of 204(a) of the Act, as not permitting judicial review of the Price Administrator's denial of such a protest, has deprived petitioners of due process of law; and such deprivation of due process is not remedied by the provisions of Section 204(c)(1) incorporated in the Act subsequent to the filing of the protest.

ARGUMENT.

I.

The protest under Section 203(a) was timely filed.

Petitioners' protest was filed June 15, 1944, under the provisions of Section 203(a) of the Act. It asserted that the Regulation in question had been invalid during the period July 16 to September 11, 1943, on account of the Administrator's failure to make the determination required by clause (3) of the Taft Amendment. No time limitation upon the filing of the protest was imposed by the language of the Act, since the grounds of protest first arose on July 16, 1943, when the Taft Amendment was enacted, which was more than sixty days after the issuance of the Regulation. *R. E. Schanzer, Inc.* v. *Bowles*, 141 F. (2d) 262 (E.C.A.).

It is conceded by the Government that if petitioners had filed their protest between July 16, 1943, when the Taft Amendment was enacted, and September 11, 1943, when the preamble to the Regulation was amended, they would have been entitled to present in a protest the objection specified, and they would also have been entitled to a judicial determination of the question by the Emergency Court of Appeals, irrespective of any subsequent action by the Administrator. *Montgomery Ward & Company* v. *Bowles*, 147 F. (2d) 858, 861 (E.C.A.).

But the Government contends that petitioners lost their absolute right to judicial review of the validity of the Regulation because at the time of the filing of the protest the Regulation was no longer open to the objection raised in the protest and was therefore "untimely". Under the

circumstances in the case at bar, this contention amounts to saying that the Administrator may promulgate an invalid regulation; that after it has been extant for a period, he may validate it prospectively; that thereafter he may cause a person to be indicted for violations alleged to have occurred during the period when the regulation was invalid, at the same time refusing to entertain a protest then filed attacking the previous invalidity of the regulation—notwithstanding that no time limitation is imposed by the language of the Act upon the filing of the protest.

The reasoning of the Court below, sustaining the Government's contention, is that the failure of the Act to impose any express time limitation upon a protest of the type here in question "does not mean that there is no limitation whatever upon the time within which an objection to a regulation or order must be presented to the Administrator in a protest. On the contrary, as we have seen, the very nature of the protest procedure involves such a limitation." The asserted basis for this proposition is that the Act does not contemplate that the Administrator "may be wholly diverted from his all important administrative task of price control for the sole purpose of performing the unrelated judicial task of determining the effect of past regulations upon the rights and liabilities of private individuals." Thus the Court below introduces a bar to petitioners' protest of which they had no notice from the language of the Act. This construction of Section 203(a) is, we submit, untenable for the reasons stated in the dissenting opinion of Judge Laws:

> I do not agree with the interpretation of the Court that the protest procedure was created by Congress to provide relief against future controls of prices, to the exclusion of other rights and liabilities of individuals. Such rights and liabilities might be of importance equal to, if not greater than, the right to be relieved

of price controls. Frequently, a regulation has interfered with and has stricken down contracts affecting a protestant. In some instances, as in the case before us, enforcement proceedings, in the form of indictments for criminal violation of a regulation, suits to impose treble damages and suits for injunction, have been brought and are pending against a protestant. This Court is the only forum in which the invalidity of the regulation may be established. If not established in this Court, the possible effect of the invalidity of the regulation upon the rights and liabilities of the protestant may not be passed upon in other courts. The right to protest and obtain judicial review of regulations and orders issued by the Administrators was given for the benefit of individuals. I cannot believe Congress intended to give such benefit in respect only of future controls of prices and exclude the right to protest against past controls which might vitally affect rights and liabilities of individuals. I find nothing in the language of the Emergency Price Control Act of 1942 which so limits the protest and review procedure.

In the context of the present case, the protest attacking the validity of the Regulation between July 16 and September 11, 1943, was not, as the Court below asserts, filed "too late to secure any action upon the objection" simply because the objection had already been "cured" as to the future by the Administrator's amending the preamble to the Regulation on September 11. The objection was aimed at the *past* invalidity of the Regulation, and as to this objection the Administrator could still take the action sought by protestant—namely, the dismissal of the enforcement proceedings based upon alleged violations occurring before September 11. Since the Administrator "has wide scope for the exercise of his discretionary power to modify or suspend a regulation pending its administrative and judicial review" (*Yakus* v. *United States*, 321 U. S. 414), a protest directed specifically to the question of law as to when the Regulation under enforcement

became effective—a question of law upon which enforcement policy depended—was filed in time to secure proper administrative action in relation to the pending enforcement proceedings. In making an administrative decision as to whether he should prosecute or dismiss enforcement proceedings based upon past violations, certainty as to the effective date of the Regulation was of first importance to the Administrator, and the proper disposition of the protest was determinative of future action.

The construction of Section 204(a) by the Court below, as not permitting judicial review of the Price Administrator's denial of a protest such as the one here involved, conflicts with the construction given that section by this Court in the *Yakus* case:

> The Emergency Court has power to review all questions of law, including the question whether the Administrator's determination is supported by evidence, and any question of the denial of due process or any procedural error appropriately raised in the course of the proceedings.

The holding in the *Yakus* case was predicated upon the proposition that the statutory administrative procedure (prior to the incorporation of Section 204(e)(1) into the Act) was fully adequate to a defendant in a criminal case, provided he filed a timely protest. But the construction of the Act by the Court below, as Judge Laws pointed out in his dissent, "completely obstructs the right of judicial review, in spite of the existence of substantial rights dependent upon such review."

II.

Petitioners have been deprived of due process of law.

It was indicated in the majority opinion in the *Yakus*

case that the decision would have been otherwise if it had appeared that the manner in which the Act was being administered deprived the defendant in a criminal case, who had filed a timely protest, of an adequate opportunity to establish the invalidity of a regulation he was charged with having violated.

The protest in the case at bar was timely filed insofar as any time limitations were imposed by the language of the Act. But the Court below has introduced a time limitation of which petitioners had no notice from the language of the Act. It was the opinion not only of Judge Laws, in his dissent, that this construction amounted to "such a denial of a reasonable opportunity to be heard as to constitute an offense against the due process clause of the Constitution", but Judge Lindley also, in his concurring opinion, agreed that:

> It may well be that under the facts presented here complainants would have had no remedy as to their second objection before the enactment of the Stabilization Extension Act of 1944 and, thus, as Judge Laws indicates, if our conclusion is correct, would have had cause to assert the deprivation of due process.

Judge Lindley went on to say that "Congress has remedied this situation by incorporating 204(e)(1) into the Act, thereby creating a remedy to which we properly remand complainants."

But reliance upon Section 204(e)(1) simply begs the question. The actual question presented is that of interpreting the protest provisions of the Act as they stood when petitioners filed their protest, which was before the incorporation of Section 204(e)(1) into the Act. The Court below in effect says that the Act, prior to its amendment, must be construed as not having

afforded due process. Such a construction obviously should be avoided unless the language of the Act, as it stood prior to the incorporation of Section 204(e)(1), admitted of no other interpretation. We submit that in the light of the *Yakus* case the language of the Act did not require such an interpretation.

It would seem clear that the addition of Section 204 (e)(1) to the Act brought about no change in the nature of the protest proceeding. The section was added to relieve the situation denounced by Mr. Justice Rutledge in his dissent in the *Yakus* case:

> The statute thus affords the individual, to question a regulation's validity, one route and that a very narrow one, open only briefly. The administrator and others, to enforce it, have many.

The new section gave to the courts in which enforcement actions were brought the right to authorize a defendant to file a complaint in the Emergency Court of Appeals, setting forth any objection found to be made in good faith and with respect to which the Court should find there is reasonable and substantial excuse for the defendant's failure to present such objection in the regular protest procedure provided by Section 203(a). As Judge Laws observes, "Such an added right obviously can have no bearing upon the proper interpretation of the protest procedure of the Emergency Price Control Act of 1942 prior to its amendment."

It would also seem clear that Congress, by adding Section 204(e)(1), did not intend to limit the situations in which the protest procedure provided by Section 203(a) was to be invoked. On the contrary, by surrounding the added rights given by Section 204(e)(1) with specific restrictions, Congress indicated that resort to the relief provided by the new section was to be limited,

and that reliance for relief was to be placed principally upon the protest procedure afforded by Section 203(a).

It should be observed in this connection that simultaneously with the addition of Section 204(e)(1), Section 203(a) was amended so as to remove the sixty-day restriction upon the filing of protests and to provide that a protest might be filed "at any time after the issuance of any regulation". It is ironic that the Government should place reliance upon these liberalizing amendments for the purpose of whittling down the scope of Section 203(a).

Section 204(e)(1) affords no absolute right of judicial review. The review therein provided lies in the discretion of the Court before whom the enforcement action is pending. In the case at bar there was the hazard of possible refusal of the District Court to authorize the filing of a complaint[2a]. Petitioners assert that to be subjected to such hazard is to be deprived of due process of law.

CONCLUSION.

For the foregoing reasons, Sections 203(a) and 204(a) of the Act should be construed as authorizing the filing

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[2a] When petitioners' application to file a complaint under Section 204(e)(1) was heard by the District Court on May 10, 1945, counsel for the Price Administrator objected to the granting of the application upon the ground that more than thirty days had elapsed since the arraignment and that therefore the District Court was not empowered to entertain the application until after judgment. The application was granted, as appears in Appendix II, *infra*, p. 22. The question still remains whether the Emergency Court of Appeals has jurisdiction of the complaint filed pursuant to leave granted under Section 204(e)(1). If it had jurisdiction to review the denial of the protest in the case here under review, then it would seem that the complaint filed under Section 204(e)(1) ought not to be considered as properly filed.

of a protest under the circumstances in the case at bar and as authorizing the Emergency Court of Appeals to review the Price Administrator's denial of such a protest.

WHEREFORE, it is respectfully submitted that the judgment of the Court below should be reversed and the cause remanded with instructions to review, upon the merits, the Price Administrator's denial of the protest insofar as it attacks the validity of the Regulation for the period July 16 to September 11, 1943.

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JACK H. OPPENHEIM,
Of Counsel.

APPENDIX I

Pertinent provisions of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, as amended by the Stabilization Extension Act of 1944, Public Law 383, 78th Cong., 2d Sess., are as follows:

> SEC. 2 (j) Nothing in this Act shall be construed (1) as authorizing the elimination or any restriction of the use of trade and brand names; (2) as authorizing the Administrator to require the grade labeling of any commodity; (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to such commodity; or (4) as authorizing any order of the Administrator fixing maximum prices for different kinds, classes, or types of a commodity which are described in terms of specifications or standards, unless such specifications or standards were, prior to such order, in general use in the trade or industry affected, or have previously been promulgated and their use lawfully required by another Government agency.[3]
>
> * * * * * *
>
> SEC. 203 (a) *At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206,*[4] any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations

[3] Entire subsection (j) added by sec. 5 (a), Public Law 151, 78th Cong., 1st Sess. (July 16, 1943), 57 Stat. 566.

[4] As amended by sec. 106 of Stabilization Extension Act of 1944. The section formerly read, in place of italicized language: "Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206."

to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections.[5] Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing,[6] the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

* * * * *

SEC. 204 (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and

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[5] As amended by sec. 106 of Stabilization Extension Act of 1944. At this point the following language was stricken out: "At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days."

[6] As amended by sec. 106 of Stabilization Extension Act of 1944. At this point the following language was stricken out: "or ninety days after the issuance of the regulation or order (or in the case of a price schedule, ninety days after the effective date thereof specified in section 206) in respect of which the protest is filed, whichever occurs later."

file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part; to dismiss the complaint, or to remand the proceeding: *Provided*, That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or

in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

* * * * *

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

(e) (1) Within thirty days after arraignment, or such additional time as the court may allow for

good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated. The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection.

(2) In any proceeding brought pursuant to section 205 involving an alleged violation of any provision of any such regulation, order or price schedule, the court shall stay the proceeding—

(i) during the period within which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted under paragraph (1) of this subsection with respect to such provisions;

(ii) during the pendency of any protest properly filed by the defendant under section 203 prior to the institution of the proceeding under

section 205; setting forth objections to the validity of such provision which the court finds to have been made in good faith; and

(iii) during the pendency of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to such provision, and until the expiration of the time allowed in this section for the taking of further proceedings with respect thereto.

Notwithstanding the provisions of this paragraph, stays shall be granted thereunder in civil proceedings only after judgment and upon application made within five days after judgment. Notwithstanding the provisions of this paragraph, in the case of a proceeding under section 205 (a) the court granting a stay under this paragraph shall issue a temporary injunction or restraining order enjoining or restraining, during the period of the stay, violations by the defendant of any provision of the regulation, order, or price schedule involved in the proceeding. If any provision of a regulation, order, or price schedule is determined to be invalid by judgment of the Emergency Court of Appeals which has become effective in accordance with section 204 (b), any proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the extent that such proceeding or judgment is based upon violation of such provision. Except as provided in this subsection, the pendency of any protest under section 203, or judicial proceeding under this section, shall not be grounds for staying any proceeding brought pursuant to section 205; nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206.[7]

[7] Entire subsection (e) added by sec. 107 (b) of Stabilization Extension Act of 1944.

APPENDIX II

1. Following the entry of judgment by the Emergency Court of Appeals on March 27, 1945, petitioners, on April 13, 1945, filed in the District Court of the United States for the Northern District of Illinois, Eastern Division, an application for leave to file a complaint in the Emergency Court of Appeals under Section 204 (e) of the Act. Because of the absence of District Judge Walter J. LaBuy, to whom the case was assigned, the hearing on said application was postponed to May 10, 1945.

2. April 26, 1945, was the last day on which a petition for a writ of certiorari from the judgment of the Emergency Court of Appeals could be filed, and petitioners on that day filed their petition in this Court.

3. On May 10, 1945, while said petition for a writ of certiorari was still pending and undetermined, District Judge Walter J. LaBuy granted leave to complainants to file a complaint under Section 204 (e).

4. On or about May 25, 1945, the brief of the Government in opposition to petition for a writ of certiorari was filed by the Acting Solicitor General, Hugh B. Cox.

5. On May 26, 1945, the Acting Solicitor General sent the following letter to the Clerk of this Court:

May 26, 1945.

Charles Elmore Cropley, Esq.,
Clerk, Supreme Court of the United States,
Washington, D. C.

Re: No. 1206—Thomas Paper Stock Company, *et al.* *vs.* Chester Bowles, Price Administrator.

DEAR MR. CROPLEY:

We have just been advised that in *United States v. Thomas Paper Stock Company*, a criminal case in the United States District Court for the Northern

District of Illinois, referred to in our brief in opposition to certiorari in No. 1206 (p. 4), the District Court on May 10, 1945, granted leave to defendants, petitioners in No. 1206, to file a complaint in the Emergency Court of Appeals pursuant to Section 204 (e) of the Emergency Price Control Act, and that the proceedings in the District Court have been stayed pursuant to the same section.

Will you kindly bring this information to the attention of the Court in connection with its consideration of the petition and brief in opposition in No. 1206. See, particularly, the Government's brief in opposition at pages 7-10.

A copy of this letter is being sent to counsel for petitioners.

Very truly yours,

HUGH B. COX,
Acting Solicitor General.

6. On May 29, 1945, the following reply to the foregoing letter was sent to the Clerk of this Court:

May 29, 1945.

Charles Elmore Cropley, Esq.,
Clerk, Supreme Court of the United States,
Washington, D. C.

Re: No. 1206—Thomas Paper Stock Company, *et al. vs.* Chester Bowles, Price Administrator.

DEAR MR. CROPLEY:

We have received a copy of Acting Solicitor General Cox's letter of May 26, 1945, calling attention to the order entered by the United States District Court on May 10, 1945.

In this connection, we desire to point out that notwithstanding the granting of leave to file a complaint in the Emergency Court of Appeals pursuant to Section 204(e) of the Emergency Price Control Act, the question still remains whether the Emergency Court of Appeals has jurisdiction of such a complaint

in the situation in the case at bar. If, as we contend in the Petition for Certiorari, the Emergency Court had jurisdiction of the complaint filed pursuant to Section 204(a), and should have decided said complaint upon the merits, then it would not have jurisdiction of a complaint filed pursuant to leave granted under Section 204(e).

We also desire to point out that the granting of leave under Section 204(e) in the criminal case affords no relief against the invalidity of the same regulation which is involved in the treble damage action referred to in the Petition for Certiorari.

A copy of this letter is being sent to the Acting Solicitor General.

Yours very truly,

CLAUDE A. ROTH,
Counsel for Petitioner.

7. On June 4, 1945, the petition herein for a writ of certiorari to the United States Emergency Court of Appeals was granted.

8. On August 23, 1945, the Acting Solicitor General sent the following letter to the Clerk of this Court:

August 23, 1945

Charles Elmore Cropley, Esquire,
Clerk, Supreme Court of the
United States,
Washington, D. C.

Re: Thomas Paper Stock Co., *et al.*, v.
Chester Bowles, Price Administrator, No. 67.

DEAR MR. CROPLEY:

I enclose herewith a letter to me from Mr. Richard M. Field, General Counsel of the Office of Price Administration, dated August 22, 1945, directing attention to certain developments affecting the above-entitled case.

As you will observe, Mr. Field's letter points out that subsequent to the granting of certiorari on June

4, 1945, the petitioners have filed in the Emergency Court of Appeals a complaint under Section 204(e)(1) of the Emergency Price Control Act, as amended, pursuant to leave granted by the District Court for the Northern District of Illinois in certain enforcement proceedings therein pending, to which reference was made in the Government's brief in opposition in No. 67 (pp. 4, 7-8). It is also stated that the Emergency Court of Appeals has tentatively set the complaint down for oral argument on September 7, 1945. The letter points out that the issues raised in the pending complaint are identical with those which the Emergency Court of Appeals had declined to consider, for want of jurisdiction, in No. 67, which had reached the Emergency Court of Appeals pursuant to Section 204(a) of the Act. Should petitioners prevail in the case presently pending in the Emergency Court of Appeals, it follows from Section 204(e)(2) that the relief granted would apply to any pending enforcement proceedings, and would be co-extensive with that which would be afforded by a decision in the proceeding under Section 204(a), involved in No. 67.

If, as I believe, Mr. Field is right in stating that a decision by the Emergency Court of Appeals will render moot the question presented in No. 67, concerning the jurisdiction of the Emergency Court of Appeals, the Supreme Court may wish to postpone consideration and disposition of No. 67 until the Emergency Court of Appeals has rendered its decision in the case now before it. To that end I am bringing the matter to your attention.

I am sending a copy of this letter, and of the letter from Mr. Field, to counsel for petitioners.

Sincerely yours,

HAROLD JUDSON,
Acting Solicitor General

Enclosure

Following is the letter from the General Counsel of the Office of Price Administration above referred to:

August 22, 1945.

Hon. Harold Judson
Acting Solicitor General
Department of Justice
Washington 25, D. C.

DEAR MR. JUDSON:

I have recently been informed by your office that the case of Thomas Paper Stock Company, *et al.* v. Chester Bowles, Price Administrator, No. 67 in the Supreme Court, has been set for oral argument for the week of October 15. In this connection I should like to call your attention to certain proceedings now pending in the Emergency Court of Appeals which have a direct bearing upon the proceedings in the Supreme Court.

On June 8, 1945, pursuant to an order entered by the District Court for the Northern District of Illinois, under section 204(e)(1) of the Emergency Price Control Act as amended, a complaint was filed in the Emergency Court of Appeals by Thomas Paper Stock Company and Alvin E. Sandroff, petitioners in No. 67 in the Supreme Court. This complaint seeks a determination that section 1347.14(d) of Maximum Price Regulation 30 was invalid during the period July 16, 1943 to September 11, 1943 under section 2(j) of the Emergency Price Control Act of 1942, as amended, on account of the failure of the Price Administrator to make a determination prior to September 11, 1943 that no practicable alternative existed for securing effective price control with respect to unsorted waste paper. On June 21, 1945, the Price Administrator moved to dismiss the complaint on the ground that the facts alleged are legally insufficient to establish a claim upon which relief can be granted. The briefs in support of and opposition to this motion have already been filed, and the motion has been tentatively set down for oral argument on September 7, 1945.

The issue thus pending in the Emergency Court of Appeals is the identical issue which that Court declined to pass upon when it dismissed in part the complaint in No. 67 on the ground that the protest had

been filed after that particular objection had been obviated by amendment of the preamble of the Regulation. The only question properly involved in the case now pending in the Supreme Court is whether the Emergency Court of Appeals erred in declining to pass on the merits of that objection. However, the merits of the objection are now before the Emergency Court of Appeals in another proceeding between the same parties and will in all likelihood be determined by that Court before case No. 67 has been decided by the Supreme Court. If this should happen, it seems to us that case No. 67 in the Supreme Court would become moot, since a decision that the Emergency Court of Appeals had erred in declining to accept jurisdiction would result only in returning to it for determination a question which would have already been determined by the same court in another proceeding between the same parties.

In view of these circumstances, I wonder whether it would not be appropriate to suggest to the Clerk of the Supreme Court that the oral argument in case No. 67 should be postponed until after a decision by the Emergency Court of Appeals in the case of Thomas Paper Stock Company, *et al.* v. Bowles, No. 232 in the Emergency Court of Appeals.

Respectfully yours,

RICHARD H. FIELD,
General Counsel.

9. On September 7, 1945, the Emergency Court of Appeals heard oral argument on and took under advisement the Price Administrator's motion to dismiss the complaint filed under Section 204(e). The grounds asserted in support of this motion went to the merits of the question which the Emergency Court of Appeals had refused to consider in the case here under review.